

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

September 6, 2013

Les Trobman, General Counsel  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin Texas 78711-3087

Re: **SOAH Docket No. 582-13-2091; TCEQ Docket No. 2012-0486-PST-E; In Re:  
Executive Director of the Texas Commission on Environmental Quality v.  
Magic Pro Inc. d/b/a Pro Quick Lube**

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than September 26, 2013. Any replies to exceptions or briefs must be filed in the same manner no later than October 7, 2013.

This matter has been designated **TCEQ Docket No 2012-0486-PST-E; SOAH Docket No. 582-13-2091**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink that reads "Rebecca S. Smith".

Rebecca S. Smith  
Administrative Law Judge

RSS/Ls  
Enclosures  
cc: Mailing List

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**AUSTIN OFFICE**

**300 West 15th Street Suite 502  
Austin, Texas 78701  
Phone: (512) 475-4993  
Fax: (512) 322-2061**

**SERVICE LIST**

**AGENCY:** Environmental Quality, Texas Commission on (TCEQ)  
**STYLE/CASE:** MAGIC PRO INC  
**SOAH DOCKET NUMBER:** 582-13-2091  
**REFERRING AGENCY CASE:** 2012-0486-PST-E

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| <b>STATE OFFICE OF ADMINISTRATIVE<br/>HEARINGS</b> | <b><u>ADMINISTRATIVE LAW JUDGE</u><br/>ALJ REBECCA SMITH</b> |
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|---------------------------------|----------------|
| <b>REPRESENTATIVE / ADDRESS</b> | <b>PARTIES</b> |
|---------------------------------|----------------|

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TCEQ EXECUTIVE DIRECTOR

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MAGIC PRO INC

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**SOAH DOCKET NO. 582-13-2091**  
**TCEQ DOCKET NO. 2012-0486-PST-E**

|                                  |   |                                |
|----------------------------------|---|--------------------------------|
| <b>EXECUTIVE DIRECTOR OF THE</b> | § | <b>BEFORE THE STATE OFFICE</b> |
| <b>TEXAS COMMISSION ON</b>       | § |                                |
| <b>ENVIRONMENTAL QUALITY,</b>    | § |                                |
| <b>Petitioner</b>                | § |                                |
|                                  | § |                                |
| <b>v.</b>                        | § | <b>OF</b>                      |
|                                  | § |                                |
| <b>MAGIC PRO, INC. D/B/A PRO</b> | § |                                |
| <b>QUICK LUBE,</b>               | § |                                |
| <b>Respondent</b>                | § | <b>ADMINISTRATIVE HEARINGS</b> |

**I. INTRODUCTION**

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) seeks to assess administrative penalties against and obtain corrective action from Magic Pro, Inc. d/b/a Pro Quick Lube (Respondent) for violations of the Texas Water Code and the Texas Administrative Code. The ED alleges that Respondent failed to monitor underground storage tanks (USTs) for releases, failed to provide proper release detection, and failed to test the cathodic protection system at least once every three years.

The Administrative Law Judge (ALJ) finds the ED established that Respondent violated provisions of the statutes and rules. Nevertheless, for reasons set out below, the ALJ recommends that the Commission assess a \$4,000 administrative penalty, rather than the \$5,137 administrative penalty sought by the ED, and order that Respondent take corrective action.

**II. PROCEDURAL HISTORY AND JURISDICTION**

The hearing convened on July 11, 2013, before ALJ Rebecca S. Smith in the William P. Clements Building, 300 West 15<sup>th</sup> Street, Fourth Floor, Austin, Texas. The ED was represented by Rebecca Combs, attorney. Respondent was represented by its owner, Ali al-Shammari. An interpreter was provided for Mr. al-Shimari. The record closed that same day.

Notice and jurisdiction are not disputed. The attached Proposed Order contains the required Findings of Fact and Conclusions of Law concerning notice and jurisdiction.

### III. DISCOVERY MATTERS

The ED's requests for admissions 1-56 were deemed admitted because Respondent failed to timely and adequately file a response to the ED's written discovery requests. At hearing, the ALJ gave Mr. al-Shammari some leeway to testify, given his language difficulty. Mr. al-Shammari was not permitted to offer any exhibits that had not been provided during discovery, however.

### IV. APPLICABLE LAW

The Texas Water Code provides that owners and operators of USTs must comply with certain requirements set out by the Commission.<sup>1</sup> One of these requirements is that all tanks must be monitored for releases at least once every month, never exceeding 35 days between each monitoring.<sup>2</sup> Owners and operators must also provide proper release detection for the suction piping associated with the UST system.<sup>3</sup> Additionally, an owner or operator must test the cathodic protection system for operability and adequacy of protection at least once every three years.<sup>4</sup>

The Commission is authorized to assess an administrative penalty against a person who violates a provision of the Texas Water Code or a rule adopted under it.<sup>5</sup> Under the law in effect at the time of the violation, the penalty may not exceed \$10,000 per day of violation of each

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<sup>1</sup> Tex. Water Code § 26.3475(b), (c)(1), (d) (requiring compliance with Commission requirements for suction-type piping release detection equipment and for corrosion protection).

<sup>2</sup> 30 Tex. Admin. Code § 334.50(b)(1)(A).

<sup>3</sup> 30 Tex. Admin. Code § 334.50(b).

<sup>4</sup> 30 Tex. Admin. Code § 334.49(c)(4)(C).

<sup>5</sup> Tex. Water Code § 7.051.

applicable section of the Water Code or the Commission's rules.<sup>6</sup> Additionally, the Commission may order the violator to take corrective action.<sup>7</sup>

## V. FACTS

Magic Pro owns and operates the UST system and oil changing facility located at 530 North Plano Road, Garland, Dallas County, Texas. There are three USTs on the property.

On January 24, 2011, David Boone, a University of Texas at Arlington (UTA) Petroleum Storage Tank Program Investigator, conducted an on-site investigation of the facility.<sup>8</sup> At that time, Magic Pro was owned by Ahmed al-Rashed, not by Mr. al-Shammari. The inspection found the following violations:

- Failure to have corrosion protection for the UST system;
- Failure to have release detection for the UST systems; and
- Failure to provide proper release detection for the piping associated with the UST systems.<sup>9</sup>

The existence of these problems at the time of the inspection is not in dispute. And it appears from the evidence that on the day of the inspection, Mr. Boone conducted an exit interview with someone at the facility to inform him of the violations. Almost one year later, on January 5, 2012, UTA issued a Notice of Enforcement regarding the violations found in the January 24, 2011 investigation.

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<sup>6</sup> Tex. Water Code § 7.052(c); Acts 1997, 75th Leg., ch. 1072, Sec. 2, eff. Sept. 1, 1997.

<sup>7</sup> Tex. Water Code § 7.073.

<sup>8</sup> ED Ex. 1. UTA's program conducts inspections for the ED.

<sup>9</sup> The inspector found one additional violation relating to records that the ED did not assert in the hearing or in the EDFARP. Accordingly, that violation will not be discussed in this PFD.

In the meantime, Mr. al-Shammari, who had come to the United States in 2010 as a refugee from Iraq, purchased Magic Pro, Inc. from Mr. al-Rashed on June 29, 2011. He testified that Mr. al-Rashed never mentioned anything about testing. He also described the transaction as buying the store, not buying the business entity. However, it is clear that what Mr. al-Shammari purchased was, in fact, the Magic Pro entity.<sup>10</sup>

UTA Enforcement Coordinator David Carney, who also testified at hearing, contacted Mr. al-Shammari at some time after the purchase. Mr. al-Shammari speaks limited English and testified that he could not understand Mr. Carney during his first call. He testified that the second time Mr. Carney called, a friend was present and handled the conversation. He testified that his friend told him after the conversation that he needed to conduct some tests. Another friend introduced him to a company called J & S Testing (J & S), and Mr. al-Shammari hired J & S to do the necessary testing. He testified that J & S made a telephone call to find out what tests were required. He believes the call was to someone at the Commission. J & S performed some tests, which Magic Pro passed. Mr. al-Shammari faxed the test results to Mr. Carney. According to Mr. al-Shammari, Mr. Carney told him that it was too late and that he would be fined.

For his part, Mr. Carney testified that he only spoke with someone from J & S after the testing was done. He also testified that Magic Pro has come into compliance regarding the release detection for the pipes. Specifically, he testified that Magic Pro provided him with documentation showing that a triennial piping test had been performed. He emphasized, however, that he did not receive that document until May 2012. He further testified that Magic Pro also sent proof that tank tightness tests had been performed, but that this was not an approved release detection method and so this test did not bring Magic Pro fully into compliance.

Mr. Carney additionally testified about the calculation of the penalty in this matter. By the time of hearing, the ED calculated a \$5,137 penalty for two violations, based on the

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<sup>10</sup> See ED Ex. 1 at 24 (Secretary of State records).

Commission's 2002 Penalty Policy<sup>11</sup> and Texas Water Code § 7.053.<sup>12</sup> The ED used a penalty calculation worksheet to calculate the penalty.<sup>13</sup>

According to Mr. Carney, both of Magic Pro's violations are categorized as major potential harm. He testified that each violation had a subtotal of \$2,500 as the base penalty. This amount was increased by \$137 (or 2.7%) as an enhancement to capture the avoided cost of complying with the release detection requirement. This recapture is designated on the penalty calculation worksheet under other factors as justice may require. Despite coming into partial compliance, Magic Pro received no credit for good faith efforts to comply. According to the penalty calculation worksheet and Mr. Carney, this was because the compliance occurred after the initial settlement offer in March 2012.

## VI. DISCUSSION AND ANALYSIS

There is no dispute that two violations occurred, one involving the lack of release detection and the other for failing to test the cathodic protection system. Respondent did not challenge the evidence of the violations, and the ED's request for admissions on this topic are deemed admitted. Respondent's two primary arguments are that he should not be penalized because the violations occurred before he purchased the business and that he has attempted to comply with the requirements. It is undisputed that at the time of the inspection, Magic Pro had a different owner, and Mr. al-Shammari purchased the business later. Nevertheless, the company itself remained in existence throughout the time. Magic Pro was the owner and operator of the

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<sup>11</sup> ED Ex. 3, *Penalty Policy of the Texas Commission on Environmental Quality*, September 2002, RG-253.

<sup>12</sup> Under Texas Water Code § 7.053, the ED must consider the following factors:

- the history and extent of previous violations;
- the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;
- the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
- economic benefit gained through the violation;
- the amount necessary to deter future violations; and
- any other matters that justice may require.

<sup>13</sup> ED Ex. 4.

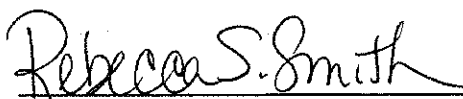
USTs at the time of the inspection, and Magic Pro remained the owner and operator at the time of hearing. The only difference was that the ownership of the corporation changed.

Based on this, the ALJ finds that Magic Pro violated Texas Water Code § 26.345(b), (c)(1), and (d) and 30 Texas Administrative Code §§ 334.49(c)(4)(C), 334.50(b)(1)(A) and (b)(2) and that Magic Pro is thus subject to administrative penalties. Mr. Carney and the ED set out the calculation under the penalty calculation worksheet. However, the ALJ is concerned that this calculation does not sufficiently take into account all the statutory elements. Specifically, the ALJ believes that other factors show that justice requires reducing, rather than increasing, the total amount of the penalty. These factors are Mr. al-Shammari's status as a recent refugee, his difficulty communicating in English, the fact that ownership and control over Magic Pro has changed since the investigation, and Mr. al-Shammari's attempts (successful, in one case) to come into compliance through testing. It appears that Mr. al-Shammari has had difficulty figuring out exactly what he needed to do, but that he has attempted to comply. And while lack of knowledge of the regulations does not excuse their violation, it (along with the other factors) should affect the total amount of the penalty. Thus, the ALJ recommends that a \$4,000 administrative penalty should be assessed against Magic Pro.

## VII. RECOMMENDATION

The ALJ recommends that the Commission adopt the attached Proposed Order finding that the alleged violations occurred, assessing a \$4,000 penalty against Respondent, and ordering corrective action.

**SIGNED September 6, 2013.**

  
REBECCA S. SMITH  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS



# TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



## **AN ORDER Assessing Administrative Penalties Against Magic Pro, Inc. d/b/a Pro Quick Lube TCEQ DOCKET NO. 2012-0486-PST-E SOAH DOCKET NO. 582-13-2091**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's First Amended Report and Petition (EDFARP) recommending that the Commission enter an enforcement order assessing administrative penalties against Magic Pro, Inc. d/b/a Pro Quick Lube (Respondent). Rebecca S. Smith, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on July 11, 2013, in Austin, Texas, and presented the Proposal for Decision.

The following are parties to the proceeding: Respondent, the Commission's Executive Director (ED), and the Office of Public Interest Counsel (OPIC).

After considering the ALJ's Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law.

### **I. FINDINGS OF FACT**

1. Respondent owns and operates an oil change facility located at 530 North Plano Road, Garland, Dallas County, Texas (Facility).
2. On January 24, 2011, Respondent was owned by Ahmed al-Rashed.

3. On January 24, 2011, an environmental investigator from the University of Texas at Arlington Petroleum Storage Tank Program conducted an investigation of the facility. The investigator observed several violations of the TCEQ rules regarding underground storage tanks (USTs).
4. The inspector noted that Respondent had failed to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring), and had failed to provide proper release detection for the suction piping associated with the UST system.
5. The inspector also noted that Respondent had failed to test the cathodic protection system for operability and adequacy of protection at least once every three years.
6. Ali al-Shammari, who had come to the United States in 2010 as a refugee from Iraq, purchased Respondent from Mr. al-Rashed on June 29, 2011. Mr. al-Rashed did not tell Mr. al-Shammari about the testing issues.
7. Mr. al-Shammari has difficulty communicating in English.
8. On January 5, 2012, UTA issued a Notice of Enforcement regarding the violations found in the January 24, 2011 investigation.
9. In May 2012, Magic Pro provided the enforcement coordinator with documentation showing that a triennial piping test had been performed.
10. Magic Pro also sent proof of other testing, but this other testing did not meet TCEQ requirements.
11. On November 15, 2012, the ED issued the EDFARP in accordance with Texas Water Code § 7.054, alleging, among other items, that Respondent violated Texas Water Code § 26.3475(b), (c)(1), and (d), and 30 Texas Administrative Code §§ 334.49(c)(4)(C), and 334.50(b)(1)(A) and (b)(2), specifically for failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring), failing to provide proper release detection for the suction piping associated with the UST system, and failing to test the cathodic protection system for operability and adequacy of protection at least once every three years.
12. Respondent has corrected the testing violations so corrective action regarding those violations is no longer necessary. Corrective action regarding release detection is still needed.
13. The ED recommended the imposition of an administrative penalty in the amount of \$5,137, and corrective action to bring the site into compliance.
14. On November 30, 2012, Respondent requested a contested case hearing on the allegations in

the EDFARP.

15. On January 23, 2013, the case was referred to SOAH for a hearing.
16. On January 28, 2013, the Commission's Chief Clerk issued notice of the preliminary hearing to all parties, which included the date, time, and place of the hearing, the legal authority under which the hearing was being held, and the violations asserted.
17. At the preliminary hearing that was held on February 28, 2013, the ED established jurisdiction to proceed.
18. The hearing on the merits was conducted on July 11, 2013, in Austin, Texas, by ALJ Smith.
19. Respondent was represented at the hearing by Mr. al-Shammari. The ED was represented by Rebecca Combs, attorney in TCEQ's Litigation Division.

## **II. CONCLUSIONS OF LAW**

1. Under Texas Water Code § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under the version of Texas Water Code § 7.052 in effect on the date of the violations, a penalty may not exceed \$10,000 per violation, per day, for the violations at issue in this case. Tex. Water Code § 7.052; Acts 1997, 75th Leg., ch. 1072, Sec. 2, eff. Sept. 1, 1997.
3. Respondent is subject to the Commission's enforcement authority, pursuant to Texas Water Code § 7.002.
4. As required by Texas Water Code § 7.055 and 30 Texas Administrative Code §§ 1.11 and 70.104, Respondent was notified of the EDFARP and of the opportunity to request a hearing on the alleged violations, and the penalties and the corrective actions proposed therein.
5. As required by Texas Government Code §§ 2001.051(1) and 2001.052; Texas Water Code § 7.058; 1 Texas Administrative Code § 155.27; and 30 Texas Administrative Code §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondent was notified of the hearing on the alleged violations and the proposed penalties and corrective action.
6. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to Texas Government Code, ch. 2003.
7. Based on the above Findings of Fact, Respondent violated Texas Water Code § 26.3475(b),

(c)(1), and (d), and 30 Texas Administrative Code §§ 334.49(c)(4)(C), and 334.50(b)(1)(A) and (b)(2).

8. In determining the amount of an administrative penalty, Texas Water Code § 7.053 requires the Commission to consider several factors including:
  - Its impact or potential impact on public health and safety, natural resources and their uses, and other persons;
  - The nature, circumstances, extent, duration, and gravity of the prohibited act;
  - The history and extent of previous violations by the violator;
  - The violator's degree of culpability, good faith, and economic benefit gained through the violation;
  - The amount necessary to deter future violations; and
  - Any other matters that justice may require.
9. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
10. Based on consideration of the above Findings of Fact, the factors set out in Code § 7.053, and the Commission's Penalty Policy, a total administrative penalty of \$4,000 is justified and should be assessed against Respondent, and the corrective action proposed by the ED should be implemented.

**NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. Magic Pro, Inc. d/b/a Pro Quick Lube is assessed an administrative penalty in the amount of \$4,000 for violation of Texas Water Code § 26.3475(b), (c)(1), and (d), and 30 Texas Administrative Code §§ 334.49(c)(4)(C), and 334.50(b)(1)(A) and (b)(2). The payment of this administrative penalty and Magic Pro, Inc.'s compliance with all the terms and conditions set forth in this Order will completely resolve the matters set forth by this Order in this action. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. All checks submitted to pay the penalty assessed by this Order shall be made out to "Texas Commission on Environmental Quality." Administrative penalty payments shall be sent with the notation "Re: Magic Pro, Inc. d/b/a Pro Quick Lube; Docket No. 2012-0486-PST-E" to:

Financial Administration Division, Revenues Section  
Attention: Cashier's Office, MC 214

Texas Commission on Environmental Quality  
P.O. Box 13088  
Austin, Texas 78711-3088

2. Within 30 days from the effective date of the Commission Order, Respondent shall implement a release detection method for the USTs and the piping associated with the USTs at the Facility, in accordance with Texas Water Code § 26.3475(b) and 30 Texas Administrative Code § 334.50(b)(1)(A) and (b)(2).
3. Within 45 days after the effective date of the Commission Order, Respondent shall submit written certification to demonstrate compliance with Corrective Action Ordering Provision No. 2. The certification required by this Corrective Action Ordering Provision shall be accompanied by detailed supporting documentation, including photographs, receipts, and/or other records, shall be notarized by a State of Texas notary public, and shall include the following certification language:

“I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

The certification shall be submitted to:

Order Compliance Team  
Enforcement Division, MC 149A  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

with a copy to:

Sam Barrett, Waste Section, Manager  
Texas Commission on Environmental Quality  
Dallas / Fort Worth Regional Office  
2309 Gravel Drive  
Fort Worth, Texas 76118-6951

4. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Respondent if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.

5. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
6. The effective date of this Order is the date the Order is final, as provided by 30 Texas Administrative Code § 80.273 and Texas Government Code § 2001.144.
7. As required by Texas Water Code § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.
8. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

Issue Date:

**TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

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**Bryan W. Shaw, Ph.D., Chairman for the Commission**